United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

74-2489

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

ANONYMOUS J. and ANONYMOUS R., Attorneys Admitted to Practice in the State of New York,
Plaintiffs-Appellants,

against

THE BAR ASSOCIATION OF ERIE COUNTY and JOHN B. WALSH, General Counsel to the General Preliminary Investigation,
Defendants-Respondents.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS

JOHN B. WALSH,
Attorney for Defendants-Respondents,
10 Ellicott Square Court,
Buffalo, New York 14203.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-6427

Z

INDEX.

	Page
Statement of the Issues Presented for Review	1
Statement of Case	3
Statement of Facts	4
Point I. This Court should reaffirm its position in *Erdmann vs. Stevens,* 458 F.2d 1205 (2d Cir. 1972) cert. denied, 409 U.S. 889 (1972) and refuse to intervene in the disciplinary proceeding which is now proceeding in the Appellate Division, Fourth Department of the State of New York and was proceeding in that department prior to the commencement of this lawsuit based on the doctrine of non-federal interference and on *Younger vs. Harris,* 401 U.S. 37, even in the light of *Mitchum v. Foster,* 407 U.S. 225	5
Conclusion. The plaintiffs-appellants' complaint should be dismissed for failure to state a claim and the opinion and order of the lower Court should be affirmed	13

TABLE OF CASES.

Blouin v. Dembitz, 489 F.2d 488	9
Cohen v. Hurley, 366 U.S. 117	8,9,10
Duke v. Texas, 477 F.2d 244, 1973	6
Erdmann v. Stevens, 458 Fed. 2d 1205 (2d Circuit 1972) cert. denied, 409 U.S. 889	1,5,6,9
Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689	9
In Re Ruffalo, 390 U.S. 544	4
Mitchum v. Foster, 407 U.S. 325	4,5
Polk v. State Bar of Texas, 480 F.2d 998 (1973)	6
Spevack v. Klein, 385 U.S. 511	8,10
Younger v. Harris, 401 U.S. 37, 1971	1,5,9

II.

STATUTES.

	Page
42 U.S.C.S. 1983	6
Section 90 of the Judiciary Law of the State of New York	2,7,10

CONSTITUTION.

Fifth Amendment	9

United States Court of Appeals

For The Second Circuit

No. 74-2489

ANONYMOUS J. and ANONYMOUS R., Attorneys
Admitted to Practice in the State of New York,
Plaintiffs-Appellants,

against

THE BAR ASSOCIATION OF ERIE COUNTY and
JOHN B. WALSH, General Counsel to the
General Preliminary Investigation,
Defendants-Respondents.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS

Statement of the Issues Presented for Review

1. Is the Federal doctrine of non-intervention in a State Bar disciplinary proceeding now pending before a State Court as announced in *Erdmann vs. Stevens,* 458 Fed. 2d 1205 (2d Circuit 1972) cert. denied, 409 U. S. 889, based on the doctrine of *Younger vs. Harris,* 401 U. S. 37, 1971 applicable in this case so that the complaint of the plaintiffs should be dismissed?

2. Should the Federal Court intervene in this case where prior to the institution of this action a petition was served on the plaintiffs and filed with the Appellate Division by the defendant asking the Court to take such disciplinary action as it deemed appropriate in a situation where plaintiffs gave

testimony in open court regarding certain alleged irregularities in the disposition of certain traffic matters in the City Court of Buffalo which was reported in the newspapers to the general public and which testimony was a repetition of the testimony that they had given in a Grand Jury proceeding after having been granted immunity under the statutes of the State of New York. Such petition being filed with the Supreme Court, Appellate Division, Fourth Department pursuant to Section 90 of the Judiciary Law of the State of New York wherein the State of New York has placed the power of disciplinary proceedings in the Appellate Division of the State of New York?

3. Should the State Courts be given the opportunity to decide the issues in this case, the applicability of the state statutes and the constitutional issues involved or should this Court intervene at this point?

4. Do the Courts of the State of New York fail to recognize and apply the laws of the Constitution of the United States so as to bring this case within the purview of the futility doctrine and is this case properly to be treated as criminal or civil to fall within the purview of the futility doctrine?

5. Can the lower Court restrain the defendants after they have already filed the petition with the Appellate Division with respect to disciplinary proceedings and if so from what are they restraining them from doing?

6. Can a State Court discipline an attorney by at least censuring the same for conduct he has admitted in open Court which has been reported in the newspapers and for which he has been given general publicity which conduct is violative of the code of professional conduct and of the penal laws of the State of New York and inform the public that it does not approve of such conduct, or is such censure a penalty or forfeiture so the Court is restrained from doing so because of the

immunity granted to the plaintiffs in the first instance and should the State Court before which this matter is pending have the first opportunity to make the determination of this question?

7. Should the Decision and Order of the lower Court be affirmed?

Statement of Case

The plaintiffs commenced an action against the defendants, in the United States District Court, Western District of New York, on July 26, 1974, seeking, *inter alia*, a preliminary injunction and final judgment permanently enjoining the defendants from proceeding with disciplinary proceedings against them.

They also sought final judgment declaring that they may not be subjected to disciplinary proceedings on matters for which they were previously granted full transactional immunity and that their compelled testimony, elicited under grants of immunity, cannot be used against them in any manner whatsoever in such proceedings.

Said plaintiffs proceeded by an Order to Show Cause, granted on July 29, 1974, to attempt to secure a preliminary injunction pending the entry of a final judgment.

The defendants filed no Answer but instead moved to dismiss the Complaint and Motion for Preliminary Injunction on the grounds that such Complaint failed to state a claim upon which relief could be granted and further that the Court lacked jurisdiction of the subject matter.

The Hon. John T. Curtin, on October 17, 1974, granted the defendants' Motion to dismiss the Complaint, without prejudice, and the plaintiffs have appealed from said Order.

Statement of Facts.

Since this is a motion brought by the defendants to dismiss the motion for preliminary injunction and the Complaint on the grounds that the Complaint failed to state a claim upon which relief could be granted and further that the Court lacked jurisdiction of the subject matter, for purposes of this Motion the facts as stated in the Complaint must be admitted except that the defendants deny that the allegation that the Courts of State of New York have uniformly refused to apply the provisions and protections of the United States Constitution in disciplinary proceedings against attorneys is a fact, but assert that it is in reality a conclusion of law and as a matter of fact, an erroneous conclusion of law.

Further the defendants point out that the activities of the plaintiffs upon which the disciplinary proceeding was brought and petition filed by the defendants with the Appellate Division and now pending before it, was as alleged in the Complaint of the plaintiffs in this case (page 4 and 5) testified to by the plaintiffs in open trial on May 31 - June 1st and June 4th before the County Court of Erie County, New York and as pointed out in the affidavits of the counsel for the defendants (on page 18) and extensively reported in the newspapers.

We would also like to point out that before the plaintiff raised the issue as to whether Section 1983 USC applied or might apply in this situation, the respondents raised that issue and also called their attention to *Mitchum vs. Foster,* 407 U.S. 325 and the holding of the Supreme Court that disciplinary proceedings may be quasi-criminal in character as decided *In Re Ruffalo,* 390 U.S. 544. The reason the respondent did this was so that the full issues could be presented before this Court.

POINT I

This Court should reaffirm its position in *Erdmann vs. Stevens*, 458 F.2d 1205 (2d Cir. 1972) cert. denied, 409 U.S. 889 (1972) and refuse to intervene in the disciplinary proceeding which is now proceeding in the Appellate Division, Fourth Department of the State of New York and was proceeding in that department prior to the commencement of this lawsuit based on the doctrine of non-federal interference and on *Younger vs. Harris*, 401 U.S. 37, even in the light of *Mitchum v. Foster*, 407 U.S. 225. and based on 28 USC 2283.

In our original brief we stated:

> "The plaintiffs do not claim that this court has jurisdiction pursuant to 42 USCS 1983 (the civil rights law) and therefore are exempted from the application of 28 USC 2283 on the basis of *Mitchum vs. Foster*, 407 U.S. 225 (1972). Even if it could be read into the pleadings that jurisdiction is sought under 42 USCS 1983, the Supreme Court in the *Mitchum* case (supra) at page 407 makes it clear that that decision does not:
>
> '. . . question or qualify in any way the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceedings. These principles in the context of state criminal prosecution, were canvassed at great length last Term in *Younger vs. Harris*, 401 U.S. 37, 27 L Ed 2d 669, 91 S Ct. 745, and its companion cases.' (See also the concurring opinion of Berger, White and Blackmun.)
>
> The plaintiffs, themselves, have characterized the State Court disciplinary proceedings as quasi-criminal (following undoubtedly the Supreme Court's characterization of the same in *In Re Ruffalo*, 390 U.S. 544, 20 L Ed 2d 117) and have sought relief as though it were a criminal case and at least on criminal law theory. Therefore, *Younger vs. Harris* is still controlling in this case."

Of course now the plaintiffs have amended their complaint to assert jurisdiction pursuant to 42 U.S.C.S. 1983.

Probably one of the more simply stated tests is found in *Polk vs. State Bar of Texas*, 480 F.2d 998 (1973) when the Fifth Circuit said that they reaffirmed the principle of law stated in their recent case of *Duke vs. Texas*, 477 F.2d 244 decided April 9, 1973 said:

> "It is a time tested rubric of our federalism that:
>
> 'Where state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted and this rule applies alike in both civil and criminal cases, *Taylor vs. Tainter*, 1873, 16 Wall (83 U.S.) 366, 370, 21 L.Ed 287, 290.'
>
> This principle is an integral part of the principles of federalism enunciated in *Younger*."

In *Erdmann (supra)* this Circuit has certainly affirmed that the State of New York and the Courts of the State of New York have consistently followed the laws of the State of New York and the Constitutional interpretations made by the Supreme Court.

Certainly this matter should be tried by the State Court and if the plaintiff is not satisfied he can appeal to the Court of Appeals and to the Supreme Court in those cases where the plaintiff has felt that the lower Court has not treated him accordingly and apply for a writ of certiorari to the Supreme Court. It is interesting to note that in those cases cited by the defendant as being contrary to the pronouncements of the Supreme Court on the meaning of the Constitution, the Supreme Court has uniformly denied to take cognizance of the fact and denied the writ of certiorari. While it is admitted that the denial of a writ of certiorari does not mean an affirmance of the lower Court case, nevertheless, such a pattern

as established here should indicate that they are not particularly disturbed. On page 6 of their brief, the plaintiffs say:

> "No one can seriously question the fact that censure, suspension from the practice of law or disbarment therefrom constitutes punishment, penalty and forfeiture in a very real sense."

In the instant case, I don't know whether they have taken a sample of all the lawyers, but if they had asked me, I certainly would say that while I can't speak for the Fourth Department, I certainly can question the fact that in this case certainly censure would not constitute punishment, penalty or forfeiture in any kind of a sense. While it is true that the present proceedings are secret pursuant to the mandate of Section 90 of the Judiciary Law of the State of New York, the fact is that these attorneys have admitted their conduct to the world in a public trial at which they testified and which was widely reported on.

If the Appellate Division should censure them and say that this is not the type of conduct which is consistent with the Code of Professional Responsibility or the laws of the State of New York, it is difficult to see how that would harm them since certainly the public is aware of their conduct which is not being suddenly brought to the light of day by the disciplinary proceeding. Right now, either the public thinks this is the type of conduct that we do in fact think is proper and therefore thinks the legal profession as a whole protects one another and permits lawyers to perform illegal conduct. Therefore, it should be told that the legal profession as a whole and the Courts in particular do not approve of such conduct.

Frankly, I can't understand how telling the public what they already know is a violation of anybody's rights or is harmful to them.

Even if the Court were merely to say that Anonymous R and Anonymous J did testify to certain acts and what those acts were and that those acts are a violation of the Code of Professional Responsibility and are not the standard of activity which is permitted by an attorney and decide that, however, because of the transactional immunity given to the lawyers that it could not censure them, at least it would let the public know that the legal profession, the Courts and the whole judicial process is concerned about a standard of legal and ethical morality among its members and would have done something but for the prohibition placed on it by the granting of immunity.

I cannot predict what the Court will do, but I do think that the profession has a need to protect itself and the public has the need to believe in the integrity of the process of the administration of justice in the State of New York. I also believe that when it loses that belief and loses confidence in the legal profession and the Courts, it is detrimental to the entire system of justice, not to mention the profession which has certainly had its share of problems in the last few years.

It may surprise some people to think that there are those who believe that *Spevack vs. Klein,* 385 U.S. 511 which overturned *Cohen v. Hurley,* 366 US 117 after the latter decision was only in effect for six years, may not have been the wisest or best decision made because there are some people who still feel that the license to practice law is a privilege which gives to those who get the license certain rights which other citizens do not enjoy (no one was forced to become a lawyer) and that this privilege may be taken away if someone fails to follow the rules of the game and performs certain acts which demean the profession and the administration of justice.

Of course, what was decided in *Spevack vs. Klein, supra,* was purely that a lawyer could not be disbarred on the sole

grounds that he asserted the Fifth Amendment and refused to testify in a disciplinary matter and that is what was overturned in *Cohen v. Hurley* (*supra*) whether that standard of conduct, that is, where one asserts the principle of the Fifth Amendment at that time is alone sufficient to result in a disciplinary proceeding may certainly be questionable but after testifying to it in open Court, there might be those who feel that some harsher disciplinary measures should be given by the Courts.

However, the Court has not spoken in this case. The Courts of New York have been given jurisdiction and frankly since they were not restrained by any injunction could have acted on this case originally but in a spirit of cooperation with the federal Court system it has held this matter pending the determination of this Court.

As Judge Griese said in his opinion in the U.S.D.C. for the Southern District, 74 Civil 2398 Judges Mansfield and Mulligan also stated in *Erdmann* that the *Younger* abstention doctrine should be applied because of the unique relationship between the Courts of a state and the attorneys admitted to practice before it.

That Court also distinguished *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689 in that that was a proceeding brought to enjoin a State Board of Optometry, not any Court and as a matter of fact the Court voided the opinion because of the Alabama Superior Court's ruling which came down subsequent to the commencement of the Federal case. In *Blouin v. Dembitz,* 489 F.2d 488, we have to remember that that was a case involving an arrest for failure to support where the persons were served by mail instead of personally and a complete reading of the case would certainly seem to make it distinguishable from the Erdmann case, *supra.*

To quote Judge Griese again at page 10 of his opinion, he states:

> "Plaintiff contends that there is an illogic in defendant's position that, on the one hand, the Fifth Amendment protection against self-incrimination does not apply to a disciplinary proceeding because such proceeding is not criminal in nature, and, on the other hand, the *Younger* abstention doctrine applies because such a proceeding *is* criminal in nature. If there is an anomaly here, plaintiff's position is at least as difficult. Plaintiff argues that a disciplinary proceeding should be held criminal in nature to permit application of the Fifth Amendment privilege, but non-criminal to prevent application of *Younger*."

Certainly, the Court ought to be given the chance to make a fair determination of the case before the Federal Courts intervene.

It should be noted too that in the case against the City Bar of the City of New York which was decided in the southern district, the disciplinary matter was only before the disciplinary committee. This matter is before the Appellate Division, Fourth Department and was before the Appellate Division, Fourth Department before the commencement of this action. Certainly the Courts of this State did follow the decision of *In Re Cohen* and *Spevack vs. Klein.*

It is impossible to say that the Courts of the State of New York do not follow the Supreme Court's rulings.

The Supreme Court, Appellate Division, Fourth Department is clearly given the power to discipline attorneys for misconduct by Section 90 of the Judiciary Law of the State of New York. The procedure for this disciplinary procedure is set forth in the section, particularly with reference to notice and serving of a petition upon an attorney in paragraph 6 of such section. The plaintiffs have the right to move to dismiss or to answer and set up affirmative defenses to such petitions

and such procedures fully satisfy the due process rule. What the action of the Appellate Division might be in this case is highly speculative, as we have said, the Court could say that Anonymous R and Anonymous J testified that they engaged in certain conduct which conduct was a violation of the Canons of Ethics, and the Penal Code and reprehensible, but because they have been granted immunity and that immunity is full, and extends to disciplinary matters, the Court is powerless to take any action with respect to them.

It could mention the plaintiffs by name and say that since their testimony was given in open Court and reported fairly, that no penalty would arise by the fact that the Court could censure them for such conduct because it is improper conduct, already publicly reported. The Court could also hold that only a limited immunity was granted and that the immunity did not extend to disciplinary proceedings, particularly where testimony is given in open Court and the same is carried in the newspapers and reflects adversely upon the Bar and invokes some other disciplinary sanction such as suspension or disbarment. (The Court can either dismiss the petition or censure, suspend or disbar in a disciplinary hearing.)

The plaintiffs, if the decision was not favorable to them, could then take the matter up to the Court of Appeals, or the defendant, Bar Association of Erie County, could, and if that decision was not favorable, then by writ of certiorari the plaintiff could appeal to the Supreme Court of the United States for a definitive ruling.

Certainly it is important in any event, that the matter be resolved. At a time when the bench and the Bar are under constant criticism for failure to bring disciplinary action, then either disciplinary action in matters warranting it should be taken or the public should be informed as to why disciplinary action cannot be taken.

It is also important for attorneys to know whether immunity granted to them will extend to disciplinary proceedings and it is important for prosecutors and Grand Juries to know whether granting immunity will include granting immunity with reference to disciplinary proceedings as well as criminal activity.

In the last analysis, however, as is clearly pointed out in the recent case in the southern district decided by Judge Griesa which has been handed up to this Court and for the reasons stated therein, since the State Court already has jurisdiction of this matter and there is a proceeding pending in a State Court involving this matter the Federal Court should not interfere and the matter should be decided in the State Court and then if need be, taken to the Supreme Court of the United States.

In passing it might be noted that in trying to ascertain what might have motivated the plaintiffs to bring this action against the Bar Association of Erie County which is the petitioner in the pending State Court proceeding and John B. Walsh, attorney of record for the Bar Association of Erie County in that proceeding and not bring an action to restrain the Court before which the state proceeding is pending, one can only conjecture that plaintiffs in this action utilize not only the theory but the papers utilized in the proceeding in the Southern District suit decided by Judge Griesa and in so doing, failed to realize that one reason the action was bought against the Association of the Bar in the City of New York and its counsel was that in that case the matter was only before that Association's Committee while in this case the matter was already the subject of a petition filed in the Supreme Court, Appellate Division, Fourth Department. In this case the defendants are not the proper party defendants to afford the relief requested by the plaintiffs. But even if

they were and the Appellate Division, Fourth Department was also named and served as a party defendant for the reasons of law stated above, the petition should be dismissed.

CONCLUSION.

The plaintiffs-appellants' complaint should be dismissed for failure to state a claim and the opinion and order of the lower Court should be affirmed.

Dated: January ....., 1975, Buffalo, New York.

Respectfully submitted,

JOHN B. WALSH,
Attorney for Defendants-Respondents,
10 Ellicott Square Court,
Buffalo, New York 14203.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Anonymous J. et al
v
The Bar Association of Erie County
Docket No. 74-2489

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 24 day of January, 1975 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

Garvey, Magner & Sullivan, Esqs.
1725 Statler Hilton
Buffalo, New York 14202
ATTENTION: Philip H. Magner, Jr., Esq.

Flaherty & Shea, Esqs.
1412 Main Place Tower
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

John B. Walsh, Esq.
10 Ellicott Square Building, Buffalo, New York 14203

Leslie R. Johnson

Sworn to before me this
24 day of January, 1975

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1975